J. Two-sided Auctions to Restructure Spectrum

241. The Commission could conduct a two-sided auction to restructure spectrum to bring together all parties interested in rights to ITFS spectrum, and MDS spectrum as well, including incumbent licensees and prospective new licensees.[580] Making available in a single auction new licenses to use ITFS spectrum in currently unassigned areas along with spectrum made available by incumbent ITFS licensees, and potentially incumbent MDS licensees as well, would enable interested parties to restructure the band rapidly by helping them learn the cost of combining and obtaining encumbered and unencumbered spectrum for new uses, without engaging in costly and time consuming bilateral and multi-lateral negotiations.[581] Thus, a restructuring auction could facilitate the voluntary clearing of spectrum by incumbent licensees and allow the Commission to issue new licenses, that more efficiently aggregate spectrum rights and/or spectrum blocks with rights and blocks associated with existing licenses.

242. Conducting a two-sided restructuring auction may raise novel issues related to competitive bidding. To the extent a restructuring auction offers new initial licenses to all interested parties, we conclude that we can conduct such an auction consistent with our mandate and authority under Section 309(j).[582] To the extent that our auction process provides private parties with a secondary market for existing licenses that enhances the final license assignment in a simultaneous auction of new licenses, we believe that we can design such an auction consistent with our mandate and authority under

[580] As noted previously, see, supra, para. 232, this potential auction would include licenses to use ITFS spectrum in currently unassigned areas and procedures proposed with respect to the auction of such licenses would be applicable to this auction as well. A recent working paper published by the Commission discusses how such two-sided auctions can be used to transition rapidly from existing spectrum hand plans and policies to new plans and more flexible policies. See, generally, Evan Kwerel and John Williams, 2002, "A Proposal for a Rapid Transition to Market Allocation of Spectrum" Office of Plans and Policy Working Paper No. 38, Federal Communications Commission. In the case of ITFS and MDS spectrum, such an auction should he open to all parties that may be eligible to hold a license to use the spectrum in order to best determine the market price. Otherwise, the auction price may not reflect significant demand for licenses.

[581] For example, an entity planning to use ITFS spectrum to provide mobile services in a geographic area pursuant to newly proposed service rules currently has to obtain the license to use any spectrum previously not authorized for use in that area and has to negotiate with each incumbent licensee within the relevant area. The complexity of these negotiations likely will increase dramatically with their number, as each incumbent licensee seeks to obtain terms at least as good as all the others. Moreover, competitors seeking the spectrum for similar or other uses may enter into negotiations with the licensees. If so, it is quite possible that the circumstances of negotiation, rather than the relative value of the rights to the spectrum, may determine its final use. Even if the negotiations are successful, they likely will take considerable time, potentially delaying deployment of new services to the public and burdening the business plans of all the parties involved. In contrast, in an auction to restructure the band, the party planning new services can easily determine the current high bids for each license that covers the relevant geographic area and decide whether or not to proceed in a very short period of time.

[582] *See* 47 U.S.C. § 309(j). The Commission's statutory authority to grant licenses through a system of competitive bidding extends to initial licenses for use of the spectrum. In an auction to restructure the band, the Commission would make available initial licenses to use the spectrum pursuant to new service rules. New services rules would he applicable, regardless of whether the entire hand plan has been revised. Thus, any restructuring auction would offer new licenses, whether conducted without, before, or after the adoption of a new band plan. The spectrum associated with these new initial licenses would include both spectrum previously licensed for use under prior service rules, if the licensees have exchanged their original licenses, and spectrum not previously authorized for use.

Sections 1, 4(i) and 303® of the Communications Act.[583] We further seek comment on the feasibility and effectiveness of a two-sided "restructuring" auction conducted by the FCC, both as described briefly below and as any commenters may propose."[584] We invite discussion of whether alternative mechanisms, such as privately conducted secondary market auctions, can or should be employed in conjunction with any FCC restructuring auction.[585] Commenters should identify the components of any proposals that they believe are essential to an effective restructuring auction, the Commission's authority to conduct an auction such as they propose, and also discuss the probable effect of modifying any significant components. Commenters should consider whether a private party could effectively conduct a two-sided auction involving existing licenses or otherwise facilitate restructuring the band and the likely efficiency of such a private secondary market auction compared to one conducted by the FCC that also includes unassigned ITFS spectrum. Could a private auction be conducted in coordination with a government auction? Are there any regulatory barriers to a privately conducted auction?

243. A restructuring auction may enable a transition to a more efficient and intensive use of the ITFS and **MDS** spectrum by enabling parties to aggregate spectrum blocks that serve their specific needs. The Commission could conduct a restructuring auction in conjunction with or as an alternative to the transition mechanisms previously discussed. Accordingly, we seek comment on whether a non-auction transition mechanism to a new band plan (such as that proposed by the Coalition) is essential to achieving more efficient and intensive use of this spectrum or whether a restructuring auction alone could achieve our objectives. If a two-sided restructuring auction is sufficient, should any aspect of the band plan be reconsidered? For example, if a restructuring auction is conducted to transition to a new band plan, would it be appropriate to modify the amount of spectrum associated with each license? Are six megahertz channels the most efficient size to auction, if an auction makes available large amounts of spectrum and permits the bidders to create customized spectrum blocks? If a two-sided restructuring auction is used in conjunction with one of transition mechanisms discussed above, we seek comment on whether the restructuring auction should take place before, or after, the non-auction transition.

1. A Two-sided Auction to Restructure the ITFS Spectrum

244. We seek comment on whether to conduct a two-sided auction to restructure the ITFS band that includes ITFS spectrum in areas covered by existing licenses, provided that incumbent licensees are willing to return their licenses and receive payments, along with ITFS spectrum in areas not

[583] See 47 U.S.C. §§ 151, 154(i), and 303(r)

[584] We note that 47 U.S.C. § 309(j)(8) requires that "all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code." Accordingly, any two-sided auction must he designed so that payments made to incumbent licensees are not "proceeds from the use of competitive bidding" within the meaning of Section 309(j)(8) or moneys required to be deposited in the Treasury by 31 U.S.C. § 3301 *et seq.*

[585] The Commission continues to explore innovative policies and mechanisms that may further its spectrum management objectives. For example, the Commission has found that privately-conducted secondary auctions or other such market-oriented mechanisms could be used to facilitate the voluntary clearing of incumbent broadcasters from the 700 MHz bands and promote the early recovery of that spectrum for new uses. ***See,*** *e.g.,* Service Rules for the 746-776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, Carriage of the Transmissions of Digital Broadcast Stations, CS Docket No. 98-120, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, ***Third*** Report and ***Order,*** 16 FCC Rcd 2703, 2718-2721, ¶¶ 37-44 (2001). The Commission also considered employing a Commission-conducted secondary auction in the 700 MHz bands, but ultimately decided that a privately-organized clearing mechanism would be better in that context. ***See id.***

currently licensed. The effectiveness of a restructuring auction will depend in part on incumbent lTFS licensees' willingness to participate. The Commission might facilitate participation by allowing incumbent licensees to receive value from wining bidders for their incumbent licenses. Such a mechanism should determine the amount incumbent licensees would receive from winning bidders to clear the spectrum. For winning bids for use of spectrum associated with one incumbent license, the incumbent licensee could receive the full amount of the winning bid directly from the buyer in return for the incumbent's transfer of its license to the buyer (subject. of course, to Commission approval under Section 310(d) of the Communications Act). The licensee would be free to use this payment as it sees fit, *e.g.*, to purchase less expensive spectrum and pay the costs of relocating, or to purchase new equipment, or to finance projects unconnected with ITFS. During the auction, incumbents dissatisfied with the amount they would receive based on current high bids for their license could place a higher bid. If, at the end of the auction, the incumbent licensee is the high bidder, the incumbent would "pay" themselves the amount of their final bid and retain their license at no net cost. In the unlikely event that no one bid on their license or a winning bidder defaults on its bid, the incumbent licensee would retain its license. These protections would enable incumbent licensees to participate in the two-sided auction without committing to giving up the spectrum. Incumbent licensees could obtain valuable information about market prices during the course of the auction which could result in a more efficient use of the licensee's resources and the public spectrum resource.

245. The effectiveness of a two-sided restructuring auction depends in part on clearly defining the spectrum rights associated with a license. If the winner of a license for ITFS spectrum in currently unassigned areas (geographic licensee) also wins an existing ITFS license encompassed by the geographic license, the incumbent license would be subsumed within the geographic license. It is also important to clearly identify the parties that may have rights with respect to spectrum associated with existing licenses. Multiple parties, including licensees and their lessees, may assert claims to ITFS spectrum associated with existing licenses. Potential claims by lessees may inhibit incumbent licensees from offering existing licenses in an auction. Even if they want to do so, licensees and lessees may be unable to resolve potential claims due to pre-auction uncertainty regarding the value of the license and the lease; the cost of replacement spectrum; and/or the cost of new or retuned equipment. Any disputed claims among such parties could reduce bidders' certainty that they will receive all the rights associated with the licenses. If such uncertainty deters participation in a restructuring auction, the restructuring auction may be less effective at assigning the new licenses to parties that value them most highly. Consequently, the restructuring auction must take potential claims into account, regardless of the ultimate validity of such claims. We seek comment on the extent and nature of probable claims and their effect. if any, on the interest of potential bidders in a restructuring auction. Are there rules that could be applied to all parties, subject to separately negotiated agreements, that would resolve uncertainty surrounding potential claims and facilitate the sale of existing licenses?

2. A Two-sided Auction to Restructure the MDS and ITFS Spectrum

246. If a two-sided restructuring auction is feasible, we also could consider restructuring both the MDS and ITFS spectrum in one auction. Including MDS spectrum in such a two-sided restructuring auction would further enhance the opportunities for parties to learn the cost of combining and obtaining encumbered and unencumbered spectrum for new uses, all without engaging in costly and time consuming bilateral and multi-lateral negotiations. It also might reduce the need for complex transitional rules to migrate to a new band plan. We seek comment on the desirability and feasibility of including MDS spectrum in any restructuring auction. Commenters should address the extent to which incumbent MDS licensees are more or less likely than existing ITFS licensees to be willing and able to exchange their licenses and participate in a restructuring auction.

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules - Permit-But-Disclose

247. This is a permit-butdisclose notice and comment rulemaking proceeding. *Ex* parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.[586]

B. Comment Period and Procedures

248. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[587] interested parties may file comments on this Notice on or before **[90 days from publication in the Federal Register],** and reply comments on or before **[135 days from publication in the Federal Register].** Comments and reply comments should be filed in WT Docket No. 03-66, **and** may be filed using the Commission's Electronic Comment Filing System (ECFS) **or** by filing paper copies?" All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

249. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number. Parties may **also** submit **an** electronic comment by e-mail via the Internet. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

250. Parties who choose to file by paper must file an original and four copies of each filing. If parties want each Commissioner to receive a personal copy of their comments, they must file an original **plus** nine copies. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12" Street, S.W., Room TW-A325, Washington, D.C. 20554. Furthermore, parties are requested to provide courtesy copies for the following Commission staff: (1) Nancy Zaczek, Charles Oliver and Stephen Zak, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 3-C124, Washington, D.C. 20554; and (2) Gary Michaels and Andrea Kelly, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12" Street, S.W., Room. 4-A760, Washington, D.C. 20554. One copy of each filing (together with a diskette copy, as indicated below) should also be sent to the Commission's copy contractor, Qualex International, 445 12" Street, SW, Room CY-B402, Washington, DC, 20554, 202-863-2893.

251. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be attached to the original paper filing submitted to the Office of the Secretary. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft ™ Word 97 for Windows or compatible software. The diskette should be accompanied by **a**

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[586] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

[587] ***See*** **47** C.F.R. §§ 1.415, 1.419.

[588] Electronic Filing of Documents in Rulemaking Proceedings, ***Report and*** Order, 13 FCC Rcd 11,322 (1998)

cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, 445 12" Street, SW. Room CY-B402, Washington, DC, 20554. 202-863-2893.

252. The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12" Street, S.W., Room CY-A257, Washington, D. C. 20554, and on the Commission's Internet Home Page: <http://www.fcc.gov>. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Qualex International, 445 12" Street, SW, Room CY-B402, Washington, DC, 20554, 202-863-2893. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

C. Initial Regulatory Flexibility Analysis

253. As required by the Regulatory Flexibility Act of 1980 (RFA),[589] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the Notice. The analysis is found in Appendix A. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the *NPRM & MO&O*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM & MO&O*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Initial Paperwork Reduction Analysis

254. This *NPRM & MO&O* may contain proposed information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.[590] Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

255. Written comments by the public and agencies on the proposed information collections are due xxx, 2003. Written comments by the OMB on the proposed and/or modified information collections are due on or before www, 2003. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley

[589] *See* 5 U.S.C.§ 603.

[590] *See* Pub. L. No. 104-13

Herman, Federal Communications Commission, 445 12'' Street, S.W., Room 1-C804, Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to **Kim** A. Johnson, Policy Analyst, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), Docket Library. Room 10236, New Executive Office Building (NEOB), 725 17'' Street, N.W., Washington, D.C. 20503 or via the Internet at Kim_A._Johnson@omb.eop.gov.

E. Further **Information**

256. For further information concerning this rulemaking proceeding, contact Nancy Zaczek or Charles Oliver at (202) 418-0680, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12'' Street, **S.W.,** Room. 4-C367, Washington, D.C. 20554; or via the Internet to *nzaczek@fcc.gov* or *coliver@fcc.gov*.

V. ORDERING CLAUSES

257. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934.47 U.S.C. §§ 151, 152, 154(i), 157, 160,201,214,301, 302, 303,307, 308, 309, 310, 319, 324,332, 333, and 706, that this ***Notice of Proposed Rulemaking and Memorandum Opinion and Order*** is hereby ADOPTED.

258. IT **IS** FURTHER ORDERED that the five-year build-out requirements in section 21.930 of **our** rules, 47 C.F.R. § 21.930, **IS** SUSPENDED until further notice.

259. IT IS FURTHER ORDERED the build-out requirements for site-based ITFS and MDS licensees and permittees that have not expired as of the release date of this ***Memorandum Opinion and Order*** ARE SUSPENDED until further notice.

260. IT IS FURTHER ORDERED that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control WILL NOT BE ACCEPTED until further notice.

261. With regard to mutually exclusive ITFS applications, IT IS FURTHER ORDERED that applications for acceptance of settlement agreements filed after the release date of this ***Notice*** of ***Proposed Rulemaking and Memorandum Opinion and Order*** WILL NOT BE ACCEPTED.

262. IT IS FURTHER ORDERED that NOTICE **IS** HEREBY GNEN of the proposed regulatory changes described in this ***NPRM & MO&O***, and that comment is sought on these proposals.

263. IT **IS** FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this ***NPRM & MO&O***, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene **H.** Dortch WTC
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

(For Notice of Proposed Rulemaking)

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[591] the Commission has prepared this present Initial Regulatory Flexibility Analysis **(IRFA)** of the possible significant economic impact on a substantial number of **small** entities by the policies and rules proposed in this ***Notice of Proposed Rule Making and Memorandum Opinion and Order (NPRM & MO&O).*** Written public comments are requested on this **IRFA.** Comments must be identified as responses to the **IRFA** and must be filed by the deadlines specified in the ***NPRM & MO&O*** for comments. The Commission will send a copy of this ***NPRM & MO&O***, including this **IRFA,** to the Chief Counsel for Advocacy of the **Small** Business Administration (SBA).[592] In addition, the ***NPRM & MO&O*** and IRFA (or summaries thereof) will be published in the Federal Register.[593]

Need for, and Objectives of, the Proposed Rules

2. In this ***NPRM*** we propose a number of changes and ask for comments concerning the **rules** governing the 2500-2690 MHz band, for the Multipoint Distribution Service (MDS), the Multichannel Multipoint Distribution Service (MMDS), and the Instructional Television Fixed Service **(ITFS).** Our proposals include:

- Proposing technical rules to increase licensee flexibility;
- Seeking comment on revising the band plan;
- Proposing service rules for mobile operation;
- Proposing to encourage entrepreneurial efforts to develop new technologies and services by opening ITFS spectrum to a wide range of applicants;
- Proposing to simplify and streamline the licensing process;
- Proposing application filing and processing to facilitate electronic filing in ULS;
- Proposing to consolidate these services under Part 101;
- Tentatively concluding that MDS and ITFS licensees should receive a six-month transition period after application processing in ULS begins before requiring mandatory electronic filing in ULS;
- Suspending the acceptance and processing of applications in this band, with certain

[591] **See** 5 U.S.C. § 603. The RFA, ***see*** 5 U.S.C. § 601-612, has been amended **by** the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[592] **See** 5 U.S.C. § 603(a).

[593] **See** 5 U.S.C. § 603(a).

exceptions, until the completion of this rulemaking proceeding;

- Suspending the current August 16, 2003 construction deadline for BTA authorization holders; and

- Proposing to assign ITFS licenses through competitive bidding.

3. We believe our proposals will encourage the enhancement of existing services using this band and the development of new innovative services to the public such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our proposals will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than the government, to determine how this band will best be used.

Legal Basis

4. The proposed action is authorized under Sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303,307,308,309,310,319,324,332,333 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[594] The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small organization,'' and "small governmental jurisdiction."[595] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[596] A small business concern is one which (1) is independently owned and operated (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[597] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[598] Nationwide, as of 1992, there were approximately 275,801 small organizations.[599] The definition of

[594] 5 U.S.C. § 603(b)(3)

[595] 5 U.S.C. § 601(6).

[596] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[596] 15 U.S.C. § 632

[597] 15 U.S.C. § 632

[598] 5 U.S.C. § 601(4).

[599] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

"small governmental jurisdiction" is one with a population of fewer than 50,000.[600] There are 85,006 governmental jurisdictions in the nation."[601] This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on how many of these entities have populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or 96 percent, have populations of fewer than 50,000.[602] The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that 96 percent, or about 81,600, are small entities that may be affected by our rules.

6. Nationwide, there are 4.44 million small business firms, according to SBA reporting data."[603] In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this NPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[604] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[605] Paging,[606] and Cellular and Other Wireless Telecommunications.[607] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

7. ***Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.*** Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[608] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years."[609] The MDS

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[600] 5 U.S.C. § 601(5).

[601] 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

[602] *Id.*

[603] *See* 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[604] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ***Trends in Telephone Service,*** Table 5.3 (May 2002) ***(Trends in Telephone Service).***

[605] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in October 2002).

[606] 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

[607] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[608] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, ***Report and Order,*** 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (***MDS Auction R&O***).

[609] 47 C.F.R. § 21.961(b)(1)

auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees **of** stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[610] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated **for** the entire year.[611] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[612] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

8. In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[613] The Commission established this small business definition in the context of this particular service and with the approval of SBA.[614] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[615] Of the 67 auction winners, 61 met the definition of a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that are considered small entities.[616] After adding the number of small business auction licensees to the number **of** incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined **as** small businesses under either the SBA or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in this *NPRM & MO&O*.

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[610] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002)

[611] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form **of** Organization)". Table 4, NAICS code 513220 (issued October 2000).

[612] In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[613] 47 C.F.R. § 21.961(b)(1).

[614] ***See MDS Auction*** *R&O*, 10 FCC Rcd 9589

[615] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. **See *Id.*** at 9608.

[616] 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $11 million or **less)). *See*** 13 C.F.R. 121.201, NAICS code 513220.

9. MDS is also heavily encumbered with licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services that includes all such companies generating $11 million or less in annual receipts.[617] This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are [832] of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this IRFA, we find there are approximately [892] small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may take advantage of our amended rules to provide two-way MDS.

10. There are presently [2032] ITFS licensees. All but [100] of these licenses are held by educational institutions (these [100] fall in the MDS category, above). Educational institutions may be included in the definition of a small entity.[618] ITFS is a non-profit non-broadcast service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts.[619] However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to [1932] of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to ITFS.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.

11. As noted previously,[620] applicants for MDS or ITFS licenses would be required to apply through the Universal Licensing System using FCC Form 601,[621] and other appropriate forms.[622] Licensees will also be required to apply for an individual station license by filing FCC Form 601 for those individual stations that (1) require submission of an Environmental Assessment of the facilities under Section 1.1307 of our Rules;[623] (2) require international coordination of the application;[624] or (3) require coordination with the Frequency Assignment Subcommittee (FAS) of the Interdepartment Radio Advisory Committee (IRAC). While these requirements are new with respect to potential licensees in the ITFS and MDS bands, the Commission has applied these requirements to licensees in other bands. Moreover, the Commission is also proposing to eliminate many burdensome filing requirements that have previously been applied to MDS and ITFS.

[625]**Steps Taken to Minimize Significant Economic Impact on Small Entities, and**

[617] 13 C.F.R. § 121.201.

[618] See 5 U.S.C. §§ 601 (3)-(5).

[619] See 13 C.F.R. § 121.210 (SIC 4833, 4841, and 4899).

[620] See para 159 *supra.*

[621] 47 C.F.R. § 1.913(a)(1).

[622] 47 C.F.R. § 1.2107.

[623] 47 C.F.R. § 1.1307.

[624] See *e.g.*, 47 C.F.R. § 1.928 (regarding frequency coordination arrangements between the U.S. and Canada)

[625] See paras. 161-170 and 173-182, *supra.*

Significant Alternatives Considered.

12. The **RFA** requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: "(I) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; **(2)** the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; **(3)** the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

13. In this ***NPRM & MO&O***, we seek comment on a number of proposals and alternatives regarding the use of the 2500-2690 MHz band. This ***NPRM & MO&O*** seeks to adopt rules that will reduce regulatory burdens, promote innovative services and encourage flexible use **of** this spectrum. It opens up economic opportunities to a variety of spectrum users, including small businesses. We consider various proposals and alternatives partly because we seek to minimize, to the extent possible, the economic impact on small businesses.

14. We have reduced the burdens wherever possible. To minimize any further negative impact, however, we propose certain exclusive incentives for small entities that will redound to their benefit. We propose the use of bidding credits for small entities that participate in auctions of licenses that are conducted pursuant to the rules proposed in this ***NPRM & MO&O***. We propose to define a **"small** business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, a "very small business" as an entity with average gross revenues for the preceding three years not exceeding $15 million, and an "entrepreneur" as an entity with average annual gross revenues for the preceding three years not exceeding $3 million."[626] We propose that entities qualifying as small businesses will receive a 15% bidding credit, that entities qualifying as very small businesses will receive a 25% bidding credit, and that entities qualifying as entrepreneurs will receive a 35% bidding credit, Qualifying small businesses, very small businesses, and entrepreneurs can reduce their winning bids by the amount of their bidding credits. We believe that these bidding credits will help **small** entities compete in **our** auctions and acquire licenses. We seek comment on our proposed small business definitions and bidding credits, including information on factors that may affect the capital requirements of the type of services a licensee may seek to provide.

15. The regulatory burdens contained in the ***NPRM & MO&O***, such as filing applications on appropriate forms, are necessary in order to ensure that the public receives the benefits of innovative new services, or enhanced existing services, **in** a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. We seek comment on significant alternatives commenters believe we should adopt.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

16. None.

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[626] **See** 5 U.S.C. § 603(c)

[627] **See *supra* para. 234.**

APPENDIX B

PROPOSED RULES

1. For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 1, 21, 73, 74, and 101 as follows:

2. Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303®, 309 and 325(e).

2. Section 1.933(c) is amended to add subparagraphs (8) and (9) as follows:

* * * * *

(8) Multipoint Distribution Service.
(9) Instructional Television Fixed Service.

3. Section 1.1102 is amended by amending paragraph 20 to read as follows:

20. Multipoint Distribution Service (including Multi-channel MDS)

a. New Station 601 & 159 220.00 CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.
b. Major Modification of License 601 &159 220.00CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. **Box** 358994, Pittsburgh, PA 15251-5155.
c. Certification of Completion of Construction 601 & 159 80.00 CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.
d. License Renewal 601 & 159 220.00 CJM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.

e. Assignment or Transfer:

(b) First Station on Application 80.00 CCM	603 & 159		Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.
(ii) Each Additional Station	603 & 159	50.00 CAM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.
f. Extension of Construction Authorization	601 & 159	185.00 CHM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.
g. Special Temporary Authority or Request for Waiver of Prior Construction Authorization	Corres & 159	100.00 CEM	Federal Communications Commission, Wireless Bureau Applications, P.O. Box 358155, Pittsburgh, PA 15251-5155.

(b) * * * *

Under the authority 47 U.S.C. § 154, amend 47 C.F.R. chapter I by removing Part 21.

3. Part 74 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCASTING AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

(b) Section 74.1 is revised to read as follows:

b) Rules in Part 74 which apply exclusively to a particular service are contained in that service subpart, as follows: Experimental Broadcast Stations, Subpart A; Remote Pickup Broadcast Stations, Subpart D; Aural Broadcast STL and Intercity Relay Stations, Subpart E; TV Auxiliary Broadcast Stations, Subpart F; Low Power TV, TV Translator and TV Booster Stations,

Subpart G; Low Power Auxiliary Stations, Subpart H FM Broadcast Translator Stations and FM Broadcast Booster Stations, Subpart L.

3. Subpart I **is** reserved.

4. Part 101 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 101 continues to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303, unless otherwise noted.

2. Section 101.3 is amended to add the following definitions:

* * * *

Instructional Television Fixed Service. **A** fixed or mobile service intended primarily for video, data, **or** voice transmissions of instructional, cultural, and other types of educational material to one or more receiving locations.

(b) * * *

Multipoint Distribution Service. A domestic public radio service rendered on microwave frequencies from one or more stations transmitting to multiple receiving facilities.

(b) Section 101.101 of the Commission's Rules is amended to read as follows:

	Radio service				
Frequency band (MHz)	Common carrier (Part 101)	Private radio (Part 101)	Broadcast auxiliary (Part 74)	Other (Parts 15, 22. 24 *25,* 74, 78, and 100)	Notes
2450-2500	LTTS	OFS	**TV** BAS	ISM	F/M/TF
2500-2650	ITFS MDS	ITFSMDS			
2650-2690	ITFS MDS	OFS MDS/ITFS			

(b) * * *

BAS: Broadcast Auxiliary Service–(Part 74)
CARS: Cable Television Relay Service –(Part 78)
CC: Common Carrier Fixed Point-to-Point Microwave Service–(Part 101, Subparts *C* & I)
DBS: Direct Broadcast Satellite–(Part 100)
DEMS: Digital Electronic Message Service–(Part 101, Subpart G)
ISM: Industrial, Scientific & Medical–(Part 18)
ITFS: Instructional Television Fixed Service–(Part 101, Subpart P)
LTTS: Local Television Transmission Service–(Part 101, Subpart J)

MAS: Multiple Address System–(Part 101)
MDS: Multipoint Distribution Service–(Part 101, Subpart Q)
OFS: Private Operational Fixed Point-to-Point Microwave Service–(Part 101, Subparts C & H)
PCS: Personal Communications Service–(Part 24)
PET: Emerging Technologies (per ET Dkt. No. 92-9, not yet assigned)
PRS: Paging and Radiotelephone Service–(Part 22, Subpart **E)**
SAT: Fixed Satellite Service–(Part **25)**

4. Part 101 is amended *to* add a new Subpart **P,** as follows:

Subpart P **Instructional Television Fixed Service**

101.1401 Purpose and Permissible Service:

(a)(1) Instructional television fixed stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized instructional television fixed station channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students.

(2) In furtherance of the educational mission of accredited schools, instructional television fixed station channels may be used for:

(b) In-service training and instruction in special **skills** and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.

(ii) Transmission of material directly related to the administrative activities of the licensee, such as the holding of conferences with personnel, distribution ***of*** reports and assignments, exchange of data and statistics, and other similar uses.

(iii) Response channels transmitting information associated with formal educational courses offered to enrolled students, including uses described in paragraphs (a)(2)(i) and (ii) of this section, from ITFS response stations to response station hubs

(b) Stations may be licensed in this service as originating or relay stations to interconnect instructional television fixed stations in adjacent areas, to deliver instructional and cultural material to, and obtain such material from, commercial and noncommercial educational television broadcast stations for use on the instructional television fixed system, and to deliver instructional and cultural material to, and obtain such material from, nearby terminals or connection points of closed circuit educational television systems employing wired distribution systems or radio facilities authorized under other parts of this Chapter, or to deliver instructional and cultural material to any CATV system serving a receiving site or sites which would be eligible for direct reception of ITFS signals under the provisions of paragraph (a) of this section.

(3) When an ITFS licensee makes capacity available on a common carrier basis. it will be subject to common carrier regulation.

(1) **A** licensee operating as a common carrier is required to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the ITFS licensee.

(2) An ITFS licensee also may alternate, without further authorization required, between rendering service on a common carrier and non-common carrier basis, provided that the licensee notifies the Commission of any service status changes at least 30 days in advance of such changes. The notification shall state whether there is any affiliation or relationship to any intended or likely subscriber

or program originator

101.1402 BTA license authorization.

(a) Winning bidders must file an application (FCC Form 601) for an initial authorization in each market and frequency block.

(b) Blanket licenses are granted for each market and frequency block. Blanket licenses cover all mobile and response stations. Blanket licenses also cover all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

101.1403 Service areas.

ITFS service areas are Basic Trading Areas (BTAs). BTAs are based on the Rand McNally ***1992 Commercial Atlas & Marketing Guide,*** 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Moca. Patillas, Penuelas, Ponce, Quebradillas, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

101.1404 Conversion of incumbent ITFS stations to geographic area licensing.

(a) Any ITFS station licensed by the Commission prior to [date to be decided] as well as assignments and transfers approved by the Commission and consummated as of [date to be decided] shall be considered incumbent and grandfathered (may continue to operate under their licensed parameters).

(b) As of [date to **be** decided], all incumbent **ITFS** licenses shall be converted to a blanket license. Pursuant to that geographic area license, such incumbent licensees may modify their systems provided the signal level [specific level to be decided] does not increase outside their pre-existing protected service area. The blanket license covers all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

Incumbent operators and geographic area licensees may negotiate alternative criteria.

(c) The frequencies associated with incumbent authorizations that have been cancelled automatically or otherwise been recovered by the Commission will automatically revert to the applicable BTA licensee.

101.1405 Performance Requirements

(a) Incumbent site-based licensees are subject to the construction requirements set forth in § 101.63.

(b)) All ITFS BTA licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which it holds a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

(1) A description of the ITFS licensee's current service in terms of geographic coverage;

(2) Copies of all orders or other adjudications that the licensee has violated the Communications Act or the Commission's Rules or policies;

(**3)** A description of the ITFS band licensee's current service in terms of population served, as well as any additional service provided during the license term;

(4) A description of the ITFS licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any ITFS licensees adjudged not to be providing substantial service will not have their licenses renewed.

101.1406 Partitioning and Disaggregation

a) Eligibility.

(1) Parties seeking' approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of license. Geographic area licensees may participate in aggregation, disaggregation, and partitioning within the bands licensed on a geographic area basis.

(2) Eligible ITFS licensees may apply to the Commission to partition their licensed geographic service areas to eligible entities and are free to determine the portion of their service areas to be partitioned. Eligible ITFS licensees may aggregate or disaggregate their licensed spectrum at any time following the grant of a license.

(b) Technical standards–

(b) There is no limitation on the amount of spectrum that an ITFS licensee may aggregate.

(2) Spectrum may be disaggregated in any amount. A licensee need not retain a minimum amount **of** spectrum.

(3) In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83).

(4) Combined partitioning and disaggregation. The Commission will consider requests from geographic area licensees for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) Construction requirements.

(1) Disaggregation. Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the **first** option, the disaggregator and Disaggregate would certify that they each will share responsibility **for** meeting the applicable construction requirements set forth in § 101.1406 for the geographic service area. If parties choose this option and either party fails to demonstrate substantial service, both licenses would be subject to forfeiture at renewal. The second option allows the parties to agree that either the disaggregator or Disaggregate would be responsible for meeting the requirements in § 101.1405 for the geographic service area. If

parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(2) Partitioning. Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently provide substantial service for their respective partitioned areas. If either licensee fails to meet its requirement in § **101.1405,** only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § **101.1405** for the entire market. If the partitionor fails to meet the requirement in § **101.1405,** however, only its license would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must certify in the appropriate portion of the application which construction option is selected.

(4) Responsible parties must submit supporting documents as required by § **101.1405.**

(d) License term. The license term for a partitioned license area and **for** disaggregated spectrum shall be the remainder of the original licensee's license term.

(b) Remote Control Operation.

Licensed ITFS stations may be operated by remote control without further authority.

101.1408 Unattended Operation

Unattended operation **of** licensed ITFS stations is permitted without further authority. An unattended relay station may be employed to receive and retransmit signals of another station provided that the transmitter is equipped with circuits which permit it to radiate only when the signal intended to be retransmitted is present at the receiver input terminals.

101.1409 License Term

(a) Incumbent ITFS licenses shall be issued for a period of 10 years beginning with the date of grant.

(b) A BTA authorization shall be issued for a period of ten years from the date the Commission declared bidding closed in the **ITFS** auction.

(b) Part 101 is amended to add a new Subpart ***Q,*** as follows:

Subpart Q: Multipoint Distribution Service:

101.1501 Purpose and Permissible Service:

Multipoint Distribution Service stations may provide any fixed or mobile services for which its frequency bands are allocated, subject to the technical and other rules contained in this part and subpart.

101.1502 BTA license authorization.

(a) Winning bidders must file an application **(FCC** Form 601) for an initial authorization in each market and frequency block.

(b) Blanket licenses are granted for each market and frequency block. Blanket licenses cover all mobile and response stations. Blanket licenses also cover all fixed stations anywhere within the

authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if:

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

101.1503 Service areas

MDS service areas are Basic Trading Areas (BTAs). BTAs are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide,* 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Moca, Patillas, Penuelas, Ponce, Quehradillas, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

101.1504 Conversion of incumbent MDS stations to geographic area licensing.

(a) Any MDS station licensed by the Commission prior to [date to be decided] as well as assignments and transfers approved by the Commission and consummated as of [date to be decided] shall be considered incumbent and grandfathered (may continue to operate under their licensed parameters).

(b) As of [date to be decided], all incumbent MDS licenses shall be converted to a blanket license. Pursuant to that geographic area license, such incumbent licensees may modify their systems provided the signal level [specific level to be decided] does not increase outside their pre-existing protected service area. The blanket license covers all fixed stations anywhere within the authorized service area, except as follows:

(1) A fixed station (other than a response station) would be required to be individually licensed if

(i) International agreements require coordination;

(ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter;

(iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

® The frequencies associated with incumbent authorizations that have been cancelled automatically **or** otherwise been recovered by the Commission will automatically revert to the applicable BTA licensee.

101.1505 Performance Requirements

(a) Incumbent site-based licensees are subject to the construction requirements set forth in § 101.63.

(b)) All MDS BTA licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which it holds a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by

the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

(1) A description of the MDS licensee's current service **in** terms of geographic coverage;

(2) Copies of all orders or other adjudications that the licensee has violated the Communications Act or the Commission's Rules or policies;

(3) **A** description of the MDS licensee's current service in terms of population served, as well as any additional service provided during the license term;

(4) A description of the MDS licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any MDS licensees adjudged not to be providing substantial service will not have their licenses renewed.

101.1506 Partitioning and Disaggregation

a) Eligibility.

(1) Parties seeking approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of license. Geographic area licensees may participate in aggregation, disaggregation, and partitioning within the bands licensed on a geographic area basis.

(2) Eligible MDS licensees may apply to the Commission to partition their licensed geographic service areas to eligible entities and are free to determine the portion of their service areas to be partitioned. Eligible MDS licensees may aggregate or disaggregate their licensed spectrum at any time following the grant of a license.

(b) Technical standards–

(b) There is no limitation on the amount of spectrum that an MDS licensee may aggregate.

(2) Spectrum may be disaggregated in any amount. **A** licensee need not retain a minimum amount of spectrum.

(3) In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude, and must be based upon the 1983 North American Datum (NAD83).

(4) Combined partitioning and disaggregation. The Commission will consider requests from geographic area licensees **for** partial assignment of licenses that propose combinations of partitioning and disaggregation.

® Construction requirements.

(1) Disaggregation. Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregate would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 101.1505 for the geographic service area. If parties choose this option and either party fails to demonstrate substantial service, both licenses would be subject to forfeiture at renewal. The second option allows the parties to agree that either the disaggregator or disaggregate would be responsible for meeting the requirements in § 101.1505 for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(2) Partitioning. Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently provide substantial service for their respective partitioned areas. **If** either licensee fails to meet its requirement in § 101.1505, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 101.1505 for the entire market. If the partitionor fails to meet the requirement in § 101.1505, however, only its license would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must certify **in** the appropriate portion **of** the application which construction option is selected.

(4) Responsible parties must submit supporting documents as required by § 101.1405.

(d) License term. The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(b) Remote Control Operation.

MDS stations may be operated by remote control without further authority

101.1508 Unattended Operation

Unattended operation **of** licensed **MDS** stations is permitted without further authority. An unattended relay station may be employed to receive and retransmit signals of another station provided that the transmitter is equipped with circuits which permit it to radiate only when the signal intended to be retransmitted is present at the receiver input terminals.

101.1509 License Term

(a) Incumbent MDS licenses shall be issued for a period of 10 years beginning with the date of grant.

(b) **A** BTA authorization shall be issued for a period **of** ten years from the date the Commission declared bidding closed in the MDS auction.

APPENDIX C

THE COALITION PLAN

1. The Coalition proposes to split the 2500-2690 MHz band into three segments, with the middle segment being reserved for high-powered MDS and ITFS stations and the two segments above and below it reserved for low-powered operations. Transition to the new band plan would proceed on a market-by-market basis at the instigation of parties ("Proponents") offering to pay the conversion costs of all affected ITFS operators. No deadlines would apply unless and until a Proponent offered to fund a market's transition. Instead, the Coalition provides a detailed description of nine safe proposals; if a Proponent offers any **of** the nine compensation schemes, the incumbent would be required to accept it. The Coalition proposes that every MDS and ITFS licensee be assigned a geographic service area. Existing circular protected service areas would be converted to geographic service areas with signal strength limits applied at their boundaries.

Coalition Band Plan

2. **ITFS** and all but two of the MDS channels are located in the 2500 – 2690 MHz band. The Coalition has requested the adoption of a new plan for this band, which consists of multiple interleaved 6-MHz channels. According to the Coalition, the intermixing of the two types of system designs (high-powerhigh site and low-power cellular systems) causes interference problems because the two system designs are fundamentally incompatible.[628] To eliminate this interference problem, the Coalition proposes that we establish a new band plan that isolates high-power, high-site systems from two-way cellular systems by separating the two different uses into different segments within the band.[629] The Coalition notes that the plan allows entities to obtain contiguous spectrum and best provides for two promising technologies – Frequency Division Duplex (FDD) and Time Division Duplex (TDD) technologies.

3. The Coalition proposes to divide the band into three major band segments consisting of the Lower Band Segment (LBS), the Middle Band Segment (MBS) and the Upper Band Segment (UBS) and three minor segments consisting of the I, J and K bands. The LBS would have twelve 5.5-megahertz wide channels extending from 2500 – 2566 MHz, the MBS would have seven 6-megahertz wide channels extending from 2572 – 2614 MHz[630] and the UBS would have twelve 5.5-megahertz wide channels extending from 2620 – 2686 MHz. The Coalition proposes to permit low-power operations in the LBS

[628] Coalition Proposal at **14.** The Coalition states that "high-power, high-site one-way operations tend to cause two types of problems. First, high-power, high-site one-way operations tend to cause interference to co-channel cellular system base stations that are located quite far away. This is because those base stations feature relatively sensitive reception antennas (to 'hear' signals from low-power subscriber equipment) and those base station antennas generally are located above the ground clutter (and thus more likely to have an uninterrupted transmission path from the co-channel high-power, high-site station in a neighboring market). Thus, these base stations are by their nature sensitive to co-channel interference. Second, transmissions from portable, nomadic and mobile subscriber equipment in cellular networks pose the potential to cause brute force overload of close-by equipment used to receive high-power, high-site services." ***See*** Coalition Proposal at 10.

[629] While comments filed in response to our public notice support the Coalition plan, including transition. in general, several commenters disagreed with parts of the Coalition plan. ***See*** *e.g.*, MMDS Licensee Coalition comments and Alliance of Independent Wireless Video Operators comments.

[630] The Coalition states that it considered the possibility of reducing the size of the MBS allocation on a market-by-market basis. It concluded, however, that the benefits of a fixed 42 megahertz wide MBS far outweigh any possible benefits from a market-by-market approach. ***See*** Coalition Proposal at 17.

Lower Band (LBS)	Band	Middle Band (MBS)	Band	Upper Band (UBS)	Band

631 Coalition Proposal at 12.

632 It could be used for downstream transmissions in a FDD system so long as the licensee meets the MBS technical and operational rules. Also, with the consent of impacted licensees, it could be used for upstream communications. *See* Coalition Proposal at 17 and Appendix B at 3.

633 Coalition Proposal, Appendix B at 2.

634 Under the Coalition plan, each licensee contributes spectrum to the Transition Bands (500 kHz for every channel in the LBS or UBS). *See* Coalition Proposal at 16, n43. Also, the Coalition notes that it has not agreed as of yet on a system of licensing and technical rules for the Transition Bands. *See* Coalition Proposal at 19, n.47.

635 Coalition Proposal at 12

636 The Coalition asserts that a 6 megahertz separation is required between MBS operations and two-way services operating in close proximity to an MBS receive site in order to protect reception of MBS video signals from beat interference. *See* Coalition Proposal at 14, n.35. It also argues that operations in these two bands be secondary to operations in the LBS, MBS and UBS bands unless otherwise agreed upon. *See* Coalition Proposal at 22. We note that the *3G Final Report* noted only that a guardband of at least two megahertz was needed to protect incumbent high-powered systems from adjacent channel interference. *See 3G Final Report* at 47-52.

637 Coalition Proposal at 17-18.

4. The Coalition recommends a market-by-market transition process to the new band plan that allows **MDS** and ITFS licensees to continue to operate pursuant to the current rules until an **MDS** or ITFS licensee triggers the transition process. They say that each of the market-by-market transition processes they propose will have four fundamental phases: (i) identifying the **MDS** and ITFS licensees that will have to participate in a given transition; (ii) planning the transition; (iii) physically shifting educational ITFS programming tracks to spectrum in the MBS and outfitting eligible ITFS receive sites with improved downconverters designed to limit the reception of signals from outside the high-power band; and (iv) terminating existing operations in transitioned markets that do not comport with the new rules.

Identifying the Parties to the Transition Process

5. As part of the basis it proposes for determining which licensees will participate in its proposed market-by-market transition process, the Coalition introduces a concept that they refer to as a "transition impact area" ("TIA").[638] They recommend that the TIA for a station be defined as its geographic service area plus, in the case of **ITFS** licensees, the specific location of any ITFS reception site certified as eligible to receive a new downconverter under the transition rules. However, they urge that there be one exception to the general approach for establishing the boundaries of GSAs and TIAs. They say that the GSAs of BTA authorization holders may be extremely large and a BTA authorization holder may not intend to launch services throughout its entire BTA/GSA at once. As a result, they explain, the size of the GSA/TIA of a BTA authorization holder calculated under the general rule may extend far beyond the area in which the BTA authorization holder's intended operations will actually have any impact. To address that kind of situation, the Coalition makes the following suggestions:

- If the BTA authorization holder is the Proponent, it should be permitted to reduce voluntarily the size of its GSA/TIA solely for purposes of any given transition process. For administrative convenience, and to reflect the fact that deployments are likely to occur based on the GSAs of incumbent **MDS** and **ITFS** licensees, the reduced GSA/TIA should be required to mirror the boundaries of any GSA of any incumbent **MDS** or **ITFS** licensee that is wholly within the BTA and should be established by having the BTA authorization holder certify to the Commission that it will not provide service outside of that particular GSA. Upon such certification, the Coalition would have the GSA/TIA deemed to be reduced in size for purposes of the particular transition; neighboring licensees with GSA/TIAs that do not overlap the resulting smaller TIA could be excused from the transition process. In the event a BTA authorization holder provides such a certification but subsequently decides to expand its service area, the Coalition would have **us** require the BTA authorization holder to invoke the transition process anew as to any licensees that were excused from the process as a result of the initial reduction in the GSA/TIA.[639]

- The Coalition says that a BTA authorization holder that is not the Proponent should only be a required participant and should only be considered for purposes of determining the other licensees that must participate in a transition process when the BTA authorization holder holds a license or conditional license for one or more facilities within the BTA. If it does not, then the BTA authorization holder should not be a participant in the transition process and its GSA/TIA should be ignored for

[638] *Id.*, Appendix **B** at 12-13 n.34

[639] *Id.*

purposes of determining which other licensees are required parties to the process.[640]

- If a BTA authorization holder that is not the Proponent does hold a license or conditional license for one or more facilities within the BTA, says the Coalition, our rules should deem it to have separate TIAs defined as 35-mile-radius circles centered at each of its transmitting stations and/or response station hubs.[641]

6. As the Coalition envisions the process, a Proponent would institute a transition for a particular market in which the following nearby licensees (even those that are not cochannel or first adjacent channel) would be required participants:

- Every licensee that has not previously been transitioned and that has a TIA that overlaps the GSA in which the contemplated base station will be located; and

- every non-transitioned licensee with a TIA to which any of the contemplated facility's transmission antennas will have an unobstructed transmission path calculated assuming receive antenna heights of 9.1 meters above ground level and employing a smooth earth with 4/3 earth curvature propagation model; and

- every non-transitioned licensee with a GSA that overlaps the GSA of a license being transitioned pursuant to the first two conditions listed above.

Moreover, says the Coalition, no operations of a new or modified base station should be permitted in the low-power channels (even if the underlying license has transitioned) unless the same three categories of nearby licensees are transitioned by the licensee to the new band plan."[642]

7. In addition to the above-listed mandatory parties to the transition process, the Coalition argues that a Proponent should be permitted, at its sole discretion and at any time, to trigger the transition process with respect to any MDS or ITFS licensee that has a GSA located in whole or part within 150 miles of any portion of its GSA. Beyond that, they recommend that any transition should also include any license with a GSA overlapping a GSA being transitioned. Granting this right to Proponents, they contend, would serve a variety of needs, the most important of which is the need to address the possibility that if left in place outside the high-power band, high-power, high-site operations would interfere with the ability of cochannel cell sites that are placed above the ground clutter to receive low-power signals from consumer equipment.[643]

8. The Coalition urges that any licensee identified for transition under these policies should be required to participate in the transition process. However, they emphasize that we should not adopt a requirement that those who participate in the transition process must necessarily be transitioned to the new bandplan upon completion. First of all, they argue that any multichannel video programming distributor that was using more than seven MDS/ITFS channels for the transmission of digitally compressed video programming to subscribers, and any other MDS or ITFS station that is collocated

[640] *Id.*

[641] *Id.*

[642] *Id.*, Appendix B at 12-13

[643] *Id.*, Appendix B at 13.

with it, should be allowed to opt out of the transition process.[644] For other stations, the Coalition says that many of the recoverable costs involved will be unknown to the Proponent at the time it issues a transition notice and that one of the purposes of the transition planning period should be to provide the Proponent an opportunity to identify all of the recoverable costs it will be responsible for should the transition occur. The Coalition says we should allow the Proponent at any time during the transition planning period to decide not to proceed with the transition due to transition cost considerations, and that the Proponent should be allowed to make that decision in its sole discretion. They further argue that thr Proponent should be allowed to terminate the process in whole or in part with respect to any licensee that it voluntarily brought into the process and any other licensee that is required to be a participant solely because of a GSA overlap with the licensee voluntarily brought in by the Proponent.[645]

9. The Coalition notes that a Proponent will not be able to determine the TIAs of ITFS stations based on Commission records because the Commission does not maintain ITFS reception site records of the sort necessary to determine eligibility for replacement downconvertes. They say that a Proponent will only be able to determine fully the TIA of an ITFS licensee by securing the necessary information from individual ITFS licensees. Therefore, they say, prior to the commencement of any transition process any potential Proponent should be permitted to serve upon any ITFS licensee at its address of record in the Commission's licensing database a pre-transition data request to elicit this information. They say we should require that such requests include the Proponent's full name, postal mailing address, contact person, email address, phone and fax number, and that the recipient of the request provide the potential Proponent with a listing that identities the location (by street address and, if known, geographic coordinates) of every constructed ITFS reception site that, as of the date of receipt of the request, would be entitled to a replacement downconverter upon transition. In addition, they say, the listing should indicate whether the downconverter is mounted on a structure attached to the building or on a free-standing structure, and the approximate height above ground level of the downconverter. They say that, if known, the response should also specify the adjacent channel D/U ratio that can he tolerated by any receiver(s) at the reception site. Finally, they say we should require that the response identify the number of ITFS video programming or data transmission tracks the ITFS licensee is entitled to receive in the high-power band and whether the ITFS licensee will accept fewer tracks in the high-power band. They say that the response should be considered a representation not only to the potential Proponent, but also to the Commission, and should be sent by certified mail with return receipt requested, courier, overnight delivery, or other service that provides evidence of receipt. They say we should require that the recipient provide the requested information to the potential Proponent by any delivery service that provides evidence of receipt no later than 21 calendar days after delivery of the request.[646]

10. The Coalition goes on to recommend that, in the absence of a timely response, we should require the potential Proponent to make at least two attempts to contact both the licensee by telephone during normal business hours to ensure receipt of the request. They further recommend that, if the potential Proponent makes contact with the licensee and the licensee requests additional time to respond, we should allow the licensee an additional fifteen calendar days to respond. In the absence of a response. they say, the potential Proponent should be permitted to proceed with the transition without having to provide for the migration of any of the licensee's programming tracks to the high-power band, without

[644] Coalition Supplemental Proposal, tiled November 14,2002, at 4-5; Coalition Proposal at Appendix B, 16-18.

[645] *Id.*. Appendix *B* at 14.

[646] *Id.*, Appendix B at 14-15.

replacing any of the licensee's downconverters. and with the unrebuttable presumption that the ITFS licensee's TIA is coterminous with its **GSA** unless the licensee subsequently provides the requested information to the Proponent before the end of the transition planning period and the Proponent is able to **use** that information as part of the transition process without prejudice to other parties and without significant additional expense to the Proponent.[647]

Planning the Transition

11. The Coalition advocates that we impose a basic procedural structure to the transition planning process. It proposes that no later than **30** days before conclusion of the transition planning period, we should require the Proponent to provide participants with a written plan for implementing the transition (the "Transition Plan"). They say we should require that the Transition Plan be sent by certified mail with return receipt requested, courier, overnight delivery, or other service that provides evidence of receipt. They maintain that the Transition Plan should identify the call signs of the stations that will transition to the new bandplan, the specific channels that each will receive following the transition, the reception sites at which replacement downconverters will be installed, the video programming and data transmission tracks that will be migrated to the new high-power band, the technical configuration of the high-power facilities, and the approximate time line for effectuating the transition and ceasing operations pursuant to the current band plan. They say that the Transition Plan should also provide for the establishment of an escrow or other appropriate mechanism for ensuring completion of the transition in accordance with the Transition Plan.[648]

12. The Coalition says that each of the other participants should be permitted to submit a written counterproposal that would have to be received by the Proponent no later than ten business days before the conclusion of the Transition Planning Period. If the Proponent receives a counterproposal. under the Coalition's plan the Proponent would have three options:

- First, the Proponent would be permitted to accept the counterproposal and proceed accordingly.

- Second, the Proponent would be permitted to invoke dispute resolution procedures for a determination as to whether its proposed Transition Plan is reasonable and take no action to implement the Transition Plan until a determination as to the reasonableness of the Transition Plan is made.

- Third, they say, the Proponent should be allowed to invoke the dispute resolution procedures for a determination as to whether its proposed Transition Plan is reasonable but. instead of awaiting a ruling, implement the counterproposal immediately. To do so, the Proponent should be required to file copies of the Transition Plan and counterproposal with the Commission and advise the Commission that it is electing to proceed with the provisions of the counterproposal under protest. The Proponent would then be free to implement the counterproposal. If the counterproposal is implemented pending dispute resolution, and the Transition Plan ultimately is found to be unreasonable, the Proponent should he required to reimburse the party that submitted the counterproposal for the fees and expenses arising out of the dispute resolution process (including the fees and costs of the arbitrator(s), and reasonable legal and engineering fees and expenses). The Coalition says that, if the counterproposal is implemented pending dispute resolution, and the Transition Plan ultimately is found to be reasonable. the party that submitted the counterproposal should **be** required to reimburse the Proponent for those

[647] *Id.*, Appendix B at 15.

[648] ***Id.,*** Appendix B at **20.**

additional documented costs incurred by the Proponent that were (i) over and above what the Proponent proposed in its Transition 'Plan, and (ii) directly related to implementing the counterproposal. This approach, they say, will assure that licensees do not create a dispute merely to frustrate a transition and/or force the payment of greenmail.[649]

Physically Shifting Educational ITFS Programming Tracks to New Channels and Outfitting Eligible ITFS Reception Sites with Improved Downconverters

13. The Coalition transition plan requires **MDS** licensees to pay their own expenses to transition to its proposed band plan. However, to implement the objective of protecting those ITFS licensees that choose to continue traditional high-power, high-site downstream video and data distribution systems against interference from **LBS** and UBS cellularized operations, the Coalition recommends that the Proponent be required, at its cost, to satisfy two fundamental responsibilities: (1) installing at eligible ITFS receive sites improved downconverters designed to limit the reception of potentially-interfering signals from outside the MBS; and (2) physically shifting every **ITFS** video programming or data transmission tracks currently being transmitted to appropriate transmission facilities operating on **MBS** channels. The intent is that the Proponent will bear all equipment, installation and other direct costs incurred to provide **for** the continued reception of the ITFS video programming and data transmission tracks at the eligible receive sites.[650]

Terminating Existing Operations in Transitioned Markets That Do Not Comport with the New Rules

14. Once the transition process is complete, licensees in the market will hold spectrum called for under the plan and be subject to the new rules.[651] The Coalition says that, in the process of transitioning the nation to the new bandplan, some licensees will be required to cease their current service offerings before they are in a position to launch new services under the new bandplan. They say that it may be necessary for licensees in one market to cease high-power, high-site operations in the LBS and UBS in order to avoid cochannel interference to next generation operations in markets quite some distance away. The Coalition says that the only build-out requirement under such circumstances should be that a licensee demonstrate substantial service at the expiration of its license. Thus, says the Coalition, licensees who have yet to construct facilities should not have their authorizations jeopardized by a failure to construct during this transitional period but should instead be judged under the "substantial service" standard that is applied to other services regulated by the Wireless Telecommunications Bureau. If the Commission chooses to apply Section 27.66 or some similar rule regarding the discontinuance, reduction or impairment of existing service, says the Coalition, the Commission should clarify the application of that rule to the MDS/ITFS transition process. Specifically, the Coalition proposes that the Commission issue a blanket waiver of that rule for all MDS and ITFS licensees, require the filing of a notice when service is commenced by a transitioned licensee operating under the new bandplan and thereafter apply the rule to that licensee in accordance with its terms, In this manner, they say, MDS and ITFS licensees will be able to smooth the transition process without fear that licenses will be jeopardized as stations cease operations to facilitate the transition. In addition, the Coalition says we should clarify that when a

[649] *Id.,* Appendix B at 20-21

[650] Coalition Proposal Appendix B at 5-11. A number of MDS licenses contend that **all** MDS and ITFS licensees shoulds be required to transition at their **own** expense. ***See*** MMDS Licensee Coalition comments at **3.**

[651] See Coalition Proposal, Appendix B for a more detailed description of the transition process.

licensed MDS or ITFS channel is used as a guard band rather than for transmissions, no filings will be required to safeguard the license for the channel being utilized as a guard band.[652]

Response Channels

15. As noted above, the seven 125 kHz response channels (part of the R channels under the Coalition band plan) associated with MDS channels E3, E4, F3, F4, H1, H2, and H3 were allocated to the Private Operational Fixed Service (POFS). The Coalition proposes to return these channels for MDS use.[653] There are no POFS licensees currently on these channels. As the Coalition notes, the R channels taken from MDS licensees were never licensed as OFS channels, probably because they are too narrow to be usable by themselves. The Coalition contends that returning those channels to their original licensees, i.e., MDS operators, would enable them to accumulate the channels with other R channels, increasing the probability that the channels would be used.[654] On that basis, they propose to reallocate the seven response channels – 2686.9375, 2687.9375, 2688.5625, 2688.6875, 2688.9375, 2689.5625 and 2689.6875 – for MDS (broadband) use.

16. The Coalition recommends that operation on the response ® channels be secondary to operation on the LBS, MBS, and UBS channels. In other words, operation on the response channels would not be allowed to cause harmful interference to operations on the LBS, MBS, and UBS channels and would be required to accept any interference caused by an LBS, MBS, or UBS licensee operating in accordance with the Commission's Rules.[655]

Geographic Area Licensing

17. The Coalition argues that elimination of site-by-site licensing and adoption of a geographic area-licensing concept for low-power operations will promote deployment of advanced low-power systems because a site-by-site licensing system is cumbersome and the transaction costs are too high to permit competitive businesses to flourish using next generation technology.[656] It notes that high-powered, one-way operations could benefit from a streamlined site-by-site licensing approach.[657]

18. MDS auction winners already hold geographic service area ("GSA") authorizations. The Coalition proposes to give existing site-based MDS and ITFS licensees a geographic service area or GSA, based on the current rules.[658] Applicants for new stations on ITFS channels must provide protection to incumbents based on a Protected Service Area (PSA).[659] MDS incumbents that obtained their licenses

[652] Coalition Proposal, Appendix B at 4 n.9.

[653] Coalition Proposal at 12, n.30

[654] *Id.*

[655] Coalition Proposal at 31

[656] *See* Coalition Proposal at 19.

[657] *Id.*

[658] Coalition Proposal at 20.

[659] 47 C.F.R. §§ 74.903, 21.902(d). An ITFS licensee's protected service area includes the area within a 35-mile radius of its transmitter site plus any reception sites beyond that radius that were registered with the Commission on September 17, 1998. Beginning on September 15, 1995, the initial service boundaries were (continued.., ..)

prior to our 1996 MDS BTA auction have 35-mile PSAs around their main stations.[660]

19. The Coalition also proposes that we grandfather certain ITFS receive sites located outside the PSA.[661] Under the Coalition's proposal, ITFS licensees must provide technical information to co-channel and adjacent channel licensees concerning the receive sites within twenty-one days of a

20. In discussing the issue of a protected area for incumbents, the Coalition points out that the rules defining a protected area have changed over the years. As a result, the protected service areas assigned co-channel incumbent MDS and ITFS licensees can overlap.[663] The Coalition argues that since none of the licensees with service areas that overlap can satisfy the interference protection criteria in the overlap area, no one can operate in these areas.[664] According to the Coalition, the MDS/ITFS industry has informally developed a method for handling this problem. The Coalition notes that the general method for dividing the overlap area is to draw a straight-line (chord) beginning and ending at the two points where the protected service areas intersect.[665] This approach has the effect of drawing a boundary along the line connecting the ends of the football-shaped overlap area, with the licensees on either side agreeing to limit the interference they generate outside their boundaries. The Coalition proposes that we codify this approach.

Treatment of Incumbent Licensees

21. The Coalition would have the transition proceed on a market-by-market basis, triggered by Proponent offers *to* compensate incumbents for changing their operations from high-power to low-power. Rather than apply a deadline, the Coalition describes nine "safe harbors" – offers that incumbents would be required to accept if Proponents offer them.

22. The Coalition says that implementing market transitions should be a relatively simple process where all of the *2.5* GHz channels are collocated and operating with matched technical parameters and all of the ITFS licensees are using just one *6* MHz channel for the transmission of

(Continued from previous page)

frozen, i.e., the circular PSA boundaries were not to be changed regardless of whether or not the licensee subsequently moved its transmitter. *Id.*

[660] *See* 47 C.F.R. §§ 21.902(d), 21.933(a)

[661] Coalition Proposal at 35.

[662] ITFS licensees must identify the location of such receive sites, the antenna make and model and the antenna height above ground and, if known, the adjacent channel D/U ratio that can be tolerated. *See* Coalition Proposal at 35-36.

[663] Effective September 15, 1995, the Commission expanded the protected service areas of incumbent site-based MDS and ITFS licensees from fifteen miles to thirty-five miles. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, *Second Order on Reconsideration,* 10 FCC Rcd 7074 **(1995).** In doing so, it created a number of overlaps between licensees whose PSAs had not overlapped before the standard PSA radius was increased.

[664] Coalition Proposal at 20-21 (*e.g.,* the rule changes have created a "no man's land").

[665] *See* Coalition Proposal Appendix A for a detailed explanation.

educational programming but that there will be situations that deviate from that standard. To minimize disputes between Proponents and licensees in such cases, they say, the Commission should establish a series of safe harbors that will allow Proponents to craft Transition Plans with the knowledge that they will be deemed reasonable in the event of a dispute. They recommend that we adopt the following safe harbor definitions and deem them to be reasonable Transition Plan provisions that can be offered by a Proponent and implemented absent agreement from affected licensees.[666]

- ***Safe Harbor # 1*** As is discussed above, the default high-power channel assigned each channel group generally will be authorized to operate after the transition with the same transmission parameters (coordinates, antenna pattern, height of center of radiation, **EIRP,** etc.) as the current downstream facilities authorized for the channel group. However, the Coalition says that situations are likely to arise where minor changes to the operating parameters are necessary to accomplish the transition. They say that neighboring cochannel or adjacent channel licensees should not be permitted to object to any change from the default configuration so long as either: (1) the change is not a major modification under the new high-power rules: or ***(2)*** the change is a major modification and the Transition Plan calls for the appropriate application for Commission consent to be filed, for it to be processed in accordance with the procedures assuring public notice and an opportunity to object, and for it to be granted prior to implementation. They say that the ITFS licensee being migrated should not be permitted to object to a Transition Plan that proposes affording the lTFS licensee with post-transition operating equipment that is as good as or better than that used before the transition. Provided that the Proponent is not proposing a change in the geographic coordinates of the facilities (other than as necessary to conform the actual location with the Commission's Antenna Survey Branch database) and provided further that the minimum D/U benchmarks discussed above will be achieved, they say, the Proponent should be permitted in the Transition Plan to propose:

    - An increase in the height of the center of radiation of the transmission antenna or a decrease in such height of no more than 8 meters (provided that such change does not result in an increase in antenna support structure lease costs to the ITFS licensee and the consent of the owner of the antenna support structure is obtained).

    - A change in the EIRP of the transmission system of up to 1.5dB in any direction

    - Digitization, which is discussed in more detail below in Safe Harbor # **3,** precision frequency offset, or other upgrades to the lTFS transmission or reception systems that allow the Proponent to invoke more advantageous interference protection requirements applicable to upgraded systems.[667]

- ***Safe Harbor # 2*** The Coalition says that, in some cases, prior to the transition, an lTFS licensee may have channel-shifted its single video programming or data transmission track to spectrum licensed to another licensee. Under the transition rules, they note, that track must be on the high-power channel licensed to the ITFS licensee upon completion of the transition. For example, the A Group licensee might have shifted its ITFS video programming to channel C1. If one of the A Group channels is currently licensed with technical parameters substantially similar to those of channel C1, we should allow a Transition Plan to call for high-power channel A4 to be licensed

[666] *Id.,* Appendix **B** at **21.**

[667] ***Id.,*** Appendix **B** at **21-22.**

with the same technical parameters as current channel C1. However, if the current **A** Group channels are licensed to operate with technical parameters materially different from those of channel C1, the Proponent should have two options. First, it should be allowed to arrange a channel swap with the licensee of the C Group so that the **A** Group licensee will receive high-power channel C4 (which will automatically be licensed with the same transmission parameters as current channel C1) in exchange for channel **A4.** Second, the Proponent should be allowed to arrange for high-power channel **A4** to operate with transmission parameters substantially similar to those of current channel C1 (see Safe Harbor # 1).[668]

- ***Safe Harbor # 3*** The Coalition says that, where an ITFS licensee would be entitled to two or more video programming or data transmission tracks in the high-power band, absent agreement prior to or during the Transition Planning Period to the contrary, we should allow the Proponent two options:

  - First, we should allow the Transition Plan to call for migration of one **of** those programming tracks to the ITFS licensee's default channel in the high-power band segment (*e.g.*, channel **A4** in the case **of** the **A** Group licensee) and provide the ITFS licensee an additional 6 MHz channel in the high-power band **for** each additional ITFS video programming or data transmission track. If the Proponent chooses this option, we should require it to assure that the additional high-power channels will be able to operate with transmission parameters substantially similar to those of the channel(s) on which the ITFS video or data tracks were broadcast before the transition (see Safe Harbor # **2**). In exchange, the contributor of each additional high-power channel would be entitled to one of the recipient ITFS licensee's channels in one of the low-power bands for each additional high-power channel provided. They say we should allow the additional high-power channels for this purpose to be ones that would have been licensed to the Proponent under the default system, or be made available by way of channel swapping arrangements with other licensees in the market orchestrated by the Proponent. The Coalition says that the channels the contributor receives in exchange **for** its high-power channel should be located at one of the ends of the recipient ITFS licensee's default allocation, rather than in the middle.

  - In the alternative, they say, we should allow the Proponent to exercise the power of calling for the installation of digital compression technology to transmit multiple tracks on the licensee's default high-power channel(s). In any case where the licensee's existing tracks are provided on only one channel using digital compression, however, the Proponent should be required to install digital compression technology on a single channel.[669]

- ***Safe Harbor # 4*** In some cases, multiple licensees currently share a channel group, with each licensed individually to one or more channels. The Coalition says that, if the licensees are either MDS licensees or ITFS licensees who do not choose to migrate programming to the high-power band and those licensees are unable to reach agreement with each other on the post-transition licensing **of** channels, we should allow the Proponent's Transition Plan to provide for the licensing of the spectrum in each segment on a pro rata basis (with channel(s) in each segment

[668] ***Id.,*** Appendix B at 22-23.

[669] Id., Appendix B at 23-24.

being disaggregated when and if necessary to provide each licensee with its pro rata share of the spectrum in each segment). If the multiple licensees are ITFS licensees and each is entitled to video programming or data transmission tracks, as in Safe Harbor # 3, they say, the Proponent should have two choices absent agreement otherwise:

- First, the Proponent should be allowed to secure for each licensee its own 6 MHz high-power channel in exchange for low-power channels assigned to the group. Following the channel swap(s) necessary to secure those additional high-powerchannels, we should allow the Transition Plan to provide for the licensing of the remaining channels in the low-power band segments and response channels on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).

- Second, the Coalition argues, we should allow the Transition Plan to call for pro rata segmentation of the default high-power channel for the group, provided that the Proponent commits to provide each of the licensees with the technology necessary for its ITFS video programming or data transmissions to be digitized, transmitted and received utilizing the provided bandwidth. Under this approach, the low-power channels would be divided among the sharing licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment). **If** only one of the sharing ITFS licensees elects to migrate video programming or data transmissions to the high-power band, we should provide that the default high-power channel assigned to that channel group be licensed to that licensee. The remaining spectrum assigned to the group should be allocated among the licensees on a pro rata basis, with the 6 MHz in the high-power band counting against that licensee's portion. To the extent necessary, they say, we should provide that the low-power spectrum could be disaggregated when and if necessary to provide each licensee with its pro rata share of the spectrum in each segment. If the one licensee that elects to migrate **ITFS** video programming transmits multiple **ITFS** video programming tracks, they say, the options identified in Safe Harbor # 3 should be available to the Proponent to satisfy its migration obligations. We should further provide that, if the proponent chooses to effectuate a channel swap to provide more than one channel in the high-power band, they add, the remaining channels assigned to the group (after considering that one or more low-power channels and associated Transition Band channels will have been swapped away to provide the additional high-power channel) could be allocated among the licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each

- ***Safe Harbor # 5*** Cases **may** arise in which, prior to the transition, the ITFS licensee of a single four channel group was operating some channels from one location and the other channels in the group from a second (or a third, or a fourth location). The Coalition says that, if the simultaneous ITFS video or data tracks are being transmitted from only one location, we should provide that the technical parameters of that location will govern the high-power license. If ITFS tracks are being transmitted from multiple locations, they say, we should require that the Proponent provide for the post-transition transmission of the appropriate number of ITFS tracks at each such location. They say we should consider the Transition Plan to be considered reasonable if it calls

[670] ***Id.*, Appendix B** at **24-25**

either for the licensing of a separate high-power channel at each location (in which case spectrum in the low-power band would be swapped) or if it calls for the split-licensing of the default high-power channel at multiple locations.[671]

- ***Safe Harbor # 6*** The Coalition says that, although Transition Plans should generally be designed to minimize the amount of time ITFS transmissions will have to cease, some disruption is inevitable. For that reason, they say that a Transition Plan should not be considered unreasonable if it calls for interruptions in ITFS transmissions, so long as those interruptions are limited to a period of seven or less consecutive days at any reception site. However, they add, we should require the Proponent to coordinate with each ITFS licensee to minimize the extent of any disruption. We should allow the Transition Plan to call for the shifting of an ITFS licensee's program to alternative channels, and such shifting should not be considered an interruption so long as the ITFS licensee's receive sites are equipped to receive and internally distribute the channel to which the programming is shifted.

- ***Safe Harbor # 7*** The Coalition says that a Proponent may determine that interference from transmissions in the high-power band to operations outside the high-power band can be mitigated by the installation of an appropriate filter on the high-power transmitter. In such case, they say, we should require the licensee operating the high-power transmitter to accept any filter proffered by the Proponent as part of a Transition Plan or thereafter and to cooperate reasonably with installation of that filter, as long as the Proponent can demonstrate that the installation of such a filter would not unreasonably degrade the performance of the licensee's system. If installation of the proposed filter would not cause a delta group delay of more than 100 nanoseconds for analog operation or more than 20 nanoseconds for digital operation, says the Coalition, we should not deem the installation of the filter to he unreasonably degrading the performance **of** the system. They argue that we should require the Proponent to supply technical information regarding the proposed filter to the high-power licensee to allow the high-power licensee to make that determination.[672]

- ***Safe Harbor # 8*** The Coalition notes that, **in** some cases, the facilities being transitioned will be used by a commercial multichannel video programming distributor ("MVPD) that either is not eligible for the opt-out program proposed by the Coalition or has chosen not to avail itself of the opportunity. In such a situation, they say, we should deem a Transition Plan to be reasonable if it provides the greater of two years from the date of the filing date of the Coalition Plan (October 7. 2002) or six months from the Proponent's transition notice before the MVPD and its affiliated licensees are required to comply with the technical rules applicable to the low-power band segments. The Coalition say they recognize that compliance with such a rule may require modification to the MVPD system, which will have to be undertaken at the MVPD's cost except as they relate to the transition of ITFS programming to the new high-power band. They say that the time afforded by this safe harbor should provide an ample opportunity for the MVPD and its affiliated licensees to make the appropriate adjustments.[673]

- ***Safe Harbor # 9*** The Coalition notes that there will be situations in which an ITFS licensee uses one or more of its channels for studio-to-transmitter links. In such a case, they say, we should

[671] ***Id.,*** Appendix **B at 25-26.**

[672] *Id.,* Appendix **B** at 26.

[673] ***Id.***

consider the Transition Plan to be reasonable if it provides for either of the following:

- the use of one of the low-power band segments for the point-to-point transmission of the ITFS video or data (through superchannelization of the licensee's contiguous low-power channels), provided the Proponent commits to re-tune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with new equipment tuned to operate on those channels and the proposal complies with the low-power technical and interference protection rules;

- the migration of the ITFS programming to the high-power band by re-tuning the existing point-to-point equipment to operate in the high-power band or replacing it with equipment tuned to operate in the high-power band;

- the replacement of the point-to-point link with point-to-point equipment licensed to the ITFS licensee in alternative spectrum, *so* long as the replacement facilities meet the definition of "comparable facilities" set out in Section 101.75(b) of the Commission's rules.[674]

[674] *Id.*, **Appendix B** at 26-27

APPENDIX D

LIST OF PLEADINGS

The following documents were filed in response to the ***Public Notice:*** Wireless Telecommunications Bureau Seeks Comment on Proposal to Revise Multichannel Multipoint Distribution Service and the Instructional Television Fixed Service Rules, RM-10586, 17 FCC Rcd 20526 (WTB 2002).

LIST OF PARTIES RESPONDING TO THE PUBLIC NOTICE

Comments

Adams Telecom, Inc.
Archdiocese of Chicago
Archdiocese of Detroit
Archdiocese of Hartford
Archdiocese of Los Angeles Education and Welfare Corporation
Atlanta Educational Services, Inc. and Atlanta Board of Education
Bellsouth Corporation et al.
Board of Trustees of the Leland Standard Junior University
Bums, Patrick J.
Caritas Telecomunications
Catholic Telemedia Network
Central Texas Communications Inc.
Clarendon Foundation
Clearwire Equipment, LLC
ClearwireTechnologies, Inc.
CNI Wireless, Inc.
Comspec Corporation
Counterpoint Communications, Inc.
Crowell & Moring
Dallas MDS Partners
Department of education Archdiocese of New York
Diocese of Dallas
Diocese of Orange
F Corporation
Illinois Institute of Technology
Independent & Wireless Video Operators
IF Wireless, Inc.
IT&E Overseas, Inc.
ITFS Parties
lTFS Spectrum Development Alliance
Kessler and Gehman Associates
Leano Rural Telephone Cooperative Inc.
Maui Sky Fiber, LLC
Michael Kelly Revocable Trust, d/a/a Shannondale Wireless
MMDS License Coalition
National Telecommunications Cooperative Association
Navini Networks, Inc.

Network for Instructional TV, Inc.
Nokia Inc.
Nucentrix Broadband Networks Inc.
Qualcomm Incorporated
Rioplex Wireless, Ltd
Roman Catholic Diocese of Rockville Centre
Sprint Corporation
The Alliance of Independent Wireless Video Operators
Texas State Technical College, Harlingen
University of Colorada
W.A.T.C.H. TV Company
Wireless Communications Association (WCA), National Instructional Television Fixed Service (NIA) and Catholic Television Network (CTN)
WH-TV, Inc. d/b/a Digital TV One
Winbeam, Inc.
Worldcom, Broadband Solutions, Inc.

Reply Comments
Intel Corporation
ITFS Spectrum Development Alliance, Inc.
Microsoft Corporation
Network for Instructional TV, Inc.
Nucentrix Broadband Networks, Inc.
NTELOS, Inc.
Polar Communications Mutual Aid Corporation
Sprint Corporation

SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands (RM-10586); et al.

By today's Notice, the Commission explores ways for the American people to enjoy the full potential of a large parcel of previously underutilized, prime spectrum real estate. The opportunity is monumental – the MMDS/ITFS band ("2.5 GHz Band") encompasses 190 MHz of contiguous spectrum. This is more than double the 83 MHz that spurred the development of WiFi at 2.4 GHz. It is roughly equal to all spectrum currently devoted to terrestrial, mobile wireless – a ubiquitous, nationwide service characterized by a high-level of competition, low prices, and constant innovation. But the 2.5 GHz band has not yet delivered similar rewards, in no small part because of the well-intentioned, but ultimately misguided, regulatory decisions of this agency.

The 2.5 GHz band has labored for years under the heavy hand of command-and-control regulation. The regime has not served the American people or the Commission's licensees particularly well. Our rules have, at times, been complex and stifling, and have shifted in their objectives – from promoting competition in the MVPD market to offering rural broadband solutions. Despite the uncertainty caused by these regulatory shifts, many licensees have strived to provide innovative and quality services. In particular, some ITFS licensees have conscientiously provided valuable educational opportunities and services to the communities they serve. Similarly, some MMDS licensees have invested considerable resources in researching, developing and deploying networks to provide service in these bands. This Notice is not intended to undermine those efforts. Instead we seek to expand the rights and opportunities of 2.5 GHz licensees, affording them greater flexibility to deliver services to the American people.

As we re-think our spectrum policies in light of the recommendations of the Spectrum Policy Task Force, the time has come chip off the regulatory barnacles encumbering ITFS and MMDS. By this Notice, we explore opportunities to increase licensed use of the 2.5 GHz band via spectrum auctions, examine unlicensed spectrum options, and evaluate rule changes to effectuate our earlier decision to add a mobile allocation to the band. I applaud the work of the National ITFS Association, the Wireless Communications Association International and the Catholic Television Network to develop proposals for the evolution of this band and to expand opportunities for all licensees to achieve their missions. I look forward to continuing our work with them to eliminate the regulatory barriers that have hindered the development of this band for far too many years.

SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66; Part 1 of the Commission's Rules – Further Competitive Bidding Procedures, WT Docket No. 03-67; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-way Transmissions, MM Docket No. 97-127; Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and the Instructional Television Fixed Service for the Gulf of Mexico. WT Docket No. 02-68, Notice of Proposed Rulemaking and Memorandum Opinion and Order

This ***NPRM*** recognizes that many MMDS and ITFS licensees currently provide very valuable services to the public. For example, many schools rely on ITFS-based services in order to complete their missions to provide educational services to their communities through distance-based learning.

It also appears, however, that these services have not yet reached their full potential and some of the spectrum remains underutilized. Many licensees have repeatedly told us of the many regulatory hurdles they face when attempting to deploy the new, innovative services demanded by the market. Today's NPRM is a step-forward to resolving many of these issues by seeking ways to promote greater flexibility for licensees. I don't know if this spectrum is best used to offer a third broadband pipe to the home, a mobile solution, a broadcast alternative or some other market-driven product, but I am willing to ask the question.

Underutilized and unused spectrum has little value. I believe that the public interest is best served by creating regulatory policies that foster effective investment and stimulate the delivery of service to the public. Today's ***NPRM*** is a substantial move toward achieving that goal by gathering a record on which the Commission can craft an appropriate band **plan** and service rules to ensure that the spectrum available for use by the MMDS/ITFS community can be used as efficiently and effectively as possible by licensees.

Moreover, I continue to support the contributions of the ITFS licensees and the important role these licensees play in furthering educational opportunities for all of us. Today's NPRM does not inhibit the ability of ITFS incumbents to offer their services as long as they wish. It simply provides a forum for looking at ways to improve the flexibility afforded to all users of the MMDS/ITFS spectrum. I believe that affording flexibility to license holders is imperative if we are to achieve the goal of efficient and effective use of the radiocommunications spectrum resource.

I recognize, however, that certain ITFS and MMDS licensees did not obtain their authorizations at auction and depending **on** the outcome of this proceeding they may obtain an increased value through secondary markets. Accordingly, I believe as we review the record in this proceeding, we must carefully weigh the public interest benefits of the auction proposal in comparison to having spectrum underutilized.

Finally, I would like to add my thanks to the Coalition – the group that submitted the initial plan that formed the basis of the **NPRM,** the other innovators in the band, and the hard work of the Wireless Telecommunications Bureau in moving forward with this proposal.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL J. COPPS

RE: ***Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules – Further Competitive Bidding Procedures; Amendment of Parts 21 an 74 to enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico (Notice of Proposed Rulemaking and Memorandum Opinion and Order)***

It is the Commission's responsibility to promote the intensive and efficient use of the 2.5 GHz band, and I commend the Chairman and the Wireless Bureau for their work on this NPRM. The wide-ranging questions contained in this item will allow the Commission to explore several different ways of making ITFS, MMDS, and MDS serve America's students and consumers better.

However, I must express some concern about the potential results of this proceeding. The **NPRM** asks whether the Commission should remove the requirement that ITFS licensees use the spectrum entrusted to them for educational purposes. It also asks whether the Commission should allow ITFS licensees to sell their licensees to the highest bidder, where a private company could buy the spectrum and dispense with any educational activity. Such an outcome would threaten this important educational tool. If ITFS becomes just another commercial service, we will have lost the last place on the spectrum reserved specifically for education. ITFS certainly has its problems. It worries me greatly that many licensees lease such a high percentage of their spectrum to companies that do not engage in education, and that some licensees have not built out their facilities even though they have had licenses for many years. But I would rather work to make ITFS a better educational tool than say that it cannot be saved.

As we all know, the Commission set aside spectrum for ITFS almost forty years ago. It did so to give educators a powerful tool to help their students. The paramount public interest in the ITFS spectrum should continue to be to support an educational programming mission. While we must seek to find improvements that will result in the ITFS spectrum being used more intensively, and we must admit that the current use of ITFS is not as intense as it could be, our goal must be to do this in a way that promotes the educational mission.

Additionally, ITFS licensees were given their spectrum for free. This makes sense as they are public schools and non-profit educators and were required to use their spectrum to serve the public through education. Many private MMDS and MDS licensees also received their spectrum for free. If we allow these licensees to sell their spectrum, we could see a rush of licensees who received their spectrum for free selling their licenses and pocketing the proceeds. If this occurs we will be vulnerable to charges of allowing windfall profits using the public spectrum. Whether those profiting are educational institutions or private telecommunications carriers, I do not see how this serves the public interest. Wisely, this NPRM queries whether such an outcome is desirable.

But in the end this is a NF'RM and not an order. The Bureau and my colleagues worked hard to ensure that the item includes wide-ranging questions that allow us to choose several paths. It does not preordain any of the outcomes I just described. This means that I can support this **NF'RM.** I appreciate the flexibility they showed in the drafting process.

Lastly, I want to recall that the record in last year's proceeding entitled ***Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*** makes it clear that many in the education community make excellent use of the band. The 1,275 current ITFS licensees serve millions of students on thousands of channels at more than 70,000 locations. The licensees form a broad spectrum of educators and educational entities, including state governments, state universities, public colleges, secondary schools, elementary schools, parochial and private schools. public television stations, and hospitals. These educators use the ITFS spectrum for a variety of innovative and successful applications, including telecourses at all educational levels, traditional educational programming, professional and worker training, and back office administrative communications for schools.

In order to illustrate the public interest value of this service I believe that it is important to highlight examples of the efforts of a few licensees in three broad areas where ITFS improves our country's educational performance.

- ***Rural access.*** The South Carolina Educational Television Commission includes more than 60 stations. It serves nearly 800 public schools and more than 400,000 students. Given that a majority of South Carolina's students live in rural areas, ITFS allows the state to tailor its educational technology plan so rural students have access to 1,500 hours of new educational programming each year, as well as live, interactive remote instruction. These powerful services might otherwise be beyond the reach of rural schools.

- ***Inner city access.*** The Catholic Television Network uses its ITFS licenses to serve more than half a million students and 4 million households. Recipients of these services include schools, colleges, parishes, community centers, hospitals, nursing homes, and residences across the country. From the Los Angeles Archdiocese to the New York Archdiocese, these ITFS licensees are providing critical educational services to a large number of low-income communities where services delivered via CTN's ITFS facilities bring educational resources that are otherwise unavailable.

- ***Worker training.*** Stanford University operates five ITFS channels. Using these channels, the university offers 250 graduate-level courses each year to thousands of workers at hundreds of companies in Northern California. In an era when "knowledge-based workers" are the most valuable resource to our national economy, the ITFS is giving Stanford and educational institutions around the country the ability to improve worker skills and improve productivity through remote education.

I look forward to the comments in this proceeding, and encourage as many ITFS licensees as possible, many of whom are not frequent commenters to the FCC, to get involved. We need your input